No. _____

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS – COUNTY OF HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Texas ad valorem tax system unconstitutionally diminishes the property interest of a lienholder in violation of the due process clause of the Fourteenth Amendment by authorizing the State's taxing agencies to increase the tax appraised and the tax burden on real property annually and legislatively subordinating all pre-existing liens on the property to the statutory tax lien, without providing for notice of and an opportunity to contest the increase to the holders of the pre-existing liens.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioner First National Bank of Bellaire and the Respondents Huffman Independent School District and the State of Texas – County of Harris. The same parties are before this Court.

The affiliates of Petitioner First National Bank of Bellaire are: First Bank of Deerpark; Gold Eagle Life Insurance Company, Phoenix, Arizona; Mayde Creek Bank, N.A.; Texas Coastal Bank, Pasadena, Texas; and Texas National Bank of Baytown. First National Bank of Bellaire has no parent companies or subsidiaries.

RULE 28.4(c) NOTICE

Since the proceeding draws into question the constitutionality of sections of the Texas Tax Code, and the Attorney General of Texas takes the position that neither the State of Texas nor any agency, officer, or employee of the State of Texas is a party, it is noted that title 28, United States Code, section 2403(b) may be applicable.

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To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully prays that a writ of certiorari issue to review the final judgment and opinion of the Court of Appeals for the Fourteenth District of Texas at Houston, dated February 23, 1989. That court held that Bellaire was not deprived of a property interest without due process of law when, pursuant to the Texas ad valorem tax scheme, the Respondent taxing units increased the appraised value of real property upon which Bellaire had a prior deed of trust lien, reassessed the taxes, and automatically obtained a superior statutory lien to secure the increased

taxes, without giving Bellaire notice of these actions or an opportunity to contest them.

OPINIONS BELOW

The opinion of the Texas court of appeals, which appears in the appendix hereto, is reported at 770 S.W.2d 571 (Tex. App. – Houston [14th Dist.] 1989, writ denied). The final judgment of the district court, which also appears in the appendix hereto, is not reported.

JURISDICTION

The original judgment of the court of appeals was entered on February 23, 1989. Bellaire timely filed its motion for rehearing which was overruled on March 23, 1989.

Bellaire timely filed an application for writ of error to the Texas Supreme Court, which was denied on June 28, 1989. A motion for rehearing of that denial was overruled on October 11, 1989. On October 26, 1989, pursuant to Bellaire's motion, the court of appeals stayed mandate until January 24, 1990.

This petition is filed in this Court within ninety (90) days from the overruling of rehearing below. The jurisdiction of this Court is invoked under title 28, section 1257(a), United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of . . . property, without due process of law."

Section 32.01 of the Texas Tax Code provides:

> On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on that property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.

Section 32.05(b) of the Texas Tax Code provides, in relevant part:

> [A] tax lien provided by this chapter takes priority . . . over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before attachment of the tax lien.

Section 25.19(a) of the Texas Tax Code provides, in relevant part:

> [T]he chief appraiser shall deliver a written notice to a property owner of the appraisal value of his property if:
>
> (1) the appraised value of the property is greater than it was in the preceding year;
>
> (2) the appraised value of the property is greater than the value rendered by the property owner; or
>
> (3) the property was not on the appraisal roll in the preceding year.

Section 41.41 of the Texas Tax Code in effect at the time provided:

> A property owner is entitled to protest before the appraisal review board the following actions:
>
> (1) determination of the appraised value of his property or, in the case of land appraised as provided by Subchapter C, D, or E, Chapter 28 of this code, determination of its appraised or market value;
>
> (2) unequal appraisal of his property in comparison to the median level of appraisals of other property in the appraisal district;
>
> (3) inclusion of his property on the appraisal records;
>
> (4) denial to him in whole or in part of a partial exemption;
>
> (5) determination that his land does not qualify for appraisal as provided by Subchapter C, D, or E, Chapter 23 of this code;
>
> (6) identification of the taxing units in which his property is taxable in the case of the appraisal district's appraisal roll;
>
> (7) determination that he is the owner of property; or
>
> (8) any other action that applies to the property owner and adversely affects him.

Section 42.01 of the Texas Tax Code provides, in relevant part:

A property owner is entitled to appeal:

(1) an order of the appraisal review board determining a protest by the property owner as provided by Subchapter C of Chapter 41 of this code . . . .

Section 42.09 of the Texas Tax Code provides:

(a) Except as provided by Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds:

(1) in defense to a suit to enforce collection of delinquent taxes; or

(2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.

(b) A person against whom a suit to collect a delinquent property tax is filed may plead as an affirmative defense:

(1) if the suit is to enforce personal liability for the tax, that the defendant did not own the property on which the tax was imposed on January 1 of the year for which the tax was imposed; or

(2) if the suit is to foreclose a lien securing the payment of a tax on real property, that the property was not located within the boundaries of the taxing unit seeking to foreclose the lien on January 1 of the year for which the tax was imposed.

(c) For purposes of this section, "suit" includes a counterclaim, cross-claim, or other claim filed in the course of a lawsuit.

STATEMENT OF THE CASE

A. The issue presented and the Texas tax system.

Bellaire seeks review of a Texas court of appeals' decision that a lienholder is not deprived of a property interest without due process of law when, under the Texas Tax Code ("Code"), the taxing agencies increase the appraised value of the property, reassess the taxes, and impose a superior lien on the property without providing the prior lienholder any notice of or opportunity to contest these actions.

Under Texas law, a "super-priority" lien automatically arises each year in favor of the taxing authorities to secure taxes assessed on all real property subject to its jurisdiction. The tax lien has priority over all other liens on the property (including pre-existing contractual liens) as of January 1 of each year for the taxes assessed during that year. Tex. Tax. Code Ann. § 32.01 (Vernon Supp. 1990) (tax lien automatic) & § 32.05 (Vernon 1982) (priority over pre-existing liens). Once the tax liability is finally established, the lien becomes immutable, and those with an interest in the property can preserve that interest only by payment of the tax. An increase in the tax liability (*i.e.*, the amount secured by the tax lien) of course correspondingly diminishes the value of the interests of the owner and other lienholders.[1]

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[1] There are, of course, circumstances in which even a decrease in the tax bill could diminish the lienholder's interest.

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Under the Code, the taxing authority may reassess the taxes that are secured by the automatic lien each year. It must give notice to the landowner when a tract of real property is reappraised at a higher value and taxes on the property are correspondingly increased. It must also provide the landowner an administrative hearing upon request to allow him to contest the appraisal and assessment. A landowner dissatisfied with the results of the hearing may appeal the administrative decision to district court. The Code prohibits appeal to the court, however, unless the landowner has participated in the administrative process.

The Code provides for no similar notice or opportunity for a hearing to lienholders, nor does it permit lienholders to contest the extent of the tax lien which automatically becomes superior to their interest in the property. Tex. Tax. Code Ann. § 25.19(a) (Vernon Supp. 1990) (notice of increase in appraisal given only to owner), § 41.41 (Vernon Supp. 1989) (right of protest and hearing available only to owner) & §§ 42.01-.031 (Vernon 1982 & Supp. 1989) (right to appeal to district court available only to owner, chief appraiser, county and taxing unit). With limited exceptions not applicable here[2],

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Accordingly, from a constitutional standpoint the State should be required to furnish notice and an opportunity to contest to the lienholder in all events. In this case, however, the tax burden (and thus the amount secured by the State's superpriority lien) was increased and Bellaire's bargained-for position was unquestionably prejudiced.

[2] As of May 1987, any "person" against whom suit is filed to collect a tax may assert that (1) he was not the owner of the

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the remedies provided in the Code are exclusive. Tex. Tax. Code Ann. § 42.09 (Vernon Supp. 1990).

The Texas tax scheme thus creates a "catch-22" situation. The lienholder, who clearly has a vested, material interest in the property, is excluded by law from the administrative process by which that interest often is materially and substantially affected. He is not literally excluded from the courthouse, but, as the courts below held in this case, the court can grant no relief because the lienholder did not participate in the administrative process. As discussed below, no common-law or other remedies not provided in the Code may be asserted. Thus, lienholders are deprived of the opportunity even to be heard at any point in the process by which their vested property rights are materially affected. It is the constitutionality of this system as applied to lienholders that is at issue in this case.

B. Facts of this case and proceedings below.

During the years 1984 and 1985, I.T. May, Jr. ("May") owned a 1,000 acre tract of land upon which Bellaire held a first and superior deed of trust lien. (Tr. 41) After

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property subject to the tax and avoid personal liability for the tax, or (2) the property was not within the taxing unit's jurisdiction, and avoid foreclosure of the tax lien. Prior to 1987, a person could not even assert as a defense in a suit to collect taxes that he was not the owner of the property subject to the tax, since the remedies in the Tax Code are exclusive. *Robstown Indep. School Dist. v. Anderson*, 706 S.W.2d 952 (Tex. 1986).

Bellaire's lien attached, a portion of the property consisting of 379.74 acres was reappraised by the Respondent taxing authorities, resulting in a significant increase in the appraised value and taxes on the property. (Tr. 41-42) May, who at the time was apparently in financial difficulties, failed to contest the tax appraisal or assessment. The taxing authority did not give Bellaire notice of the increased appraisal and assessment, or an opportunity to contest them. (Tr. 41)

May did not pay the 1985 taxes on the property, and the superior statutory tax lien automatically attached to secure the delinquency. Respondent Huffman ISD then initiated this litigation against May to collect the delinquent taxes through foreclosure of the statutory tax lien. (Tr. 2, 25)

During that same time period, May also defaulted in payment of the debt secured by Bellaire's deed of trust. As a result of the default, on January 7, 1986, Bellaire foreclosed its lien and purchased the property at foreclosure. (Tr. 41) Huffman ISD then impleaded Bellaire as owner of the property.

Having become owner of the property, Bellaire was given notice of the 1986 assessments. Bellaire contested the appraisal and assessments, and obtained a reduction in the appraised value of $1,000.00 per acre and a corresponding significant reduction in the taxes assessed on the property. (Tr. 42)

Huffman ISD, State of Texas – County of Harris, which had intervened in the suit to foreclose its lien for 1985 taxes, and Bellaire each filed cross-motions for summary judgment, joining issue on the questions of whether

Texas law permits a lienholder such as Bellaire to contest in any forum the extent or amount of the taxes and lien securing them and whether the lienholder is entitled for due process purposes and under the Code, to notice of and an opportunity to contest the tax appraisal, assessment, and lien before the increased tax debt becomes final and secured by the superior tax lien.[3] (Tr. 7, 15, 35) The trial court denied Bellaire's motion for summary judgment, thus precluding Bellaire from challenging the extent of the assessment and lien, and granted the motion of the taxing authorities establishing their liens as first and superior liens on the property and ordering foreclosure. (Tr. 82)

The court of appeals affirmed the trial court's summary judgment, holding that Bellaire was not deprived of a property interest without due process since Bellaire was not personally obligated to pay the taxes. *First Nat'l Bank v. Huffman Indep. School Dist.*, 770 S.W.2d 571, 573 (Tex. App. – Houston [14th Dist.] 1989, writ denied). That court also held that the Code does not require notice to Bellaire

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[3] Bellaire raised the question in the district court of the deprivation of its Fourteenth Amendment due process rights in its motion for summary judgment, its response to Respondents' motions for summary judgment, and its first amended answer. Bellaire asserted that the tax lien was not superior to its lien since it was not afforded notice of or an opportunity to contest the 1985 tax appraisal and assessment before the tax became final in violation of the Fourteenth Amendment and contrary to this Court's holding in *Mennonite*. Alternatively, Bellaire requested that the court reduce the 1985 appraised value of the property that Bellaire contends greatly exceeded the fair market value of the property. (Tr. 36, 37, 39, 73).

of the appraisal and assessment process and indeed that the Code precludes Bellaire from contesting any aspect of the tax liability. *Id.*[4]

The court attempted to distinguish this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), in which this Court held that a lienholder was unconstitutionally deprived of a property interest when a taxing authority, without prior notice to a lienholder whose identity was reasonably ascertainable, took action that had the effect of imposing a lien on the property superior to the lienholder's interest. The Texas appellate court construed the holding in *Mennonite* as requiring that notice be given to lienholders only prior to the sale of the property to pay the tax,[5] rather than prior to the final establishment of the tax liability secured by the tax lien. *Id.* The court totally ignored the applicability of the due process requirement of an opportunity to be heard.

Bellaire reiterated in its application for writ of error to the Texas Supreme Court its claims that the Texas tax scheme, which precludes it from participating in the process at any level, deprives Bellaire of its rights to due

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[4] Bellaire raised the question of the deprivation of its Fourteenth Amendment due process rights in points of error numbers one and two in its appellant's brief in the court of appeals. Appellant's brief at 8. The court of appeals overruled both these points of error. *First Nat'l Bank v. Huffman Indep. School Dist.*, 770 S.W.2d 571, 573 (Tex App. – Houston [14th Dist.] 1989, writ denied).

[5] As discussed below, the term "tax sale" has a meaning in the Texas system different from its meaning under the Indiana scheme at issue in *Mennonite*. The court of appeals ignored this critical difference.

process under the Fourteenth Amendment.[6] The Texas Supreme Court, however, denied the application.

REASONS FOR GRANTING THE WRIT

A. This is a case of substantial nationwide importance.

The decision of the Texas court of appeals leaves intact an ad valorem tax scheme that permits a taxing agency to significantly diminish a lienholder's property interest through the reappraisal and assessment process without providing any meaningful opportunity for the lienholder to object to the agency's actions. This tax scheme as construed by the Texas courts offends the Fourteenth Amendment and emasculates this Court's holding in *Mennonite* by allowing empty notice to a lienholder of an impending foreclosure sale after the tax lien has attached and the tax is final, and by totally precluding the lienholder from contesting the amount secured by the lien.

The issues raised are significant to taxing authorities and lienholders in Texas and elsewhere.[7] As discussed

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[6] Bellaire raised the question of the deprivation of its Fourteenth Amendment due process rights in points of error numbers one and two in its application for writ of error to the Texas Supreme Court. Application at 3-4.

[7] As stated by Respondent Huffman ISD in its motion to publish the opinion of the court of appeals, this case

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below, the states have employed a variety of alternatives in their efforts to identify and comply with the requirements of the Fourteenth Amendment. This Court's guidance is needed throughout these jurisdictions.

In some states, any "taxpayer" or "property owner" has standing to challenge the appraisal and assessment of taxes on *any* real property within the jurisdiction of the taxing authority. *E.g.* Ark. Code Ann. § 26-27-317 (1987) ("any property owner" has standing); Revenue Act of 1939 § 117, Ill. Ann. Stat. ch. 120, para. 598 (Smith-Hurd Supp. 1989) ("any taxpayer" may complain); West Va. Code § 11-1B-11 (1987) ("[a]ny person who is a taxpayer of ad valorem property taxes" for good cause may protest an appraisal). The obvious advantage of these systems affording broad standing is that inequities in the taxing scheme and improper dispensation of tax favors can be more frequently challenged and corrected.

At the opposite end of the spectrum, Texas appears to be one of the most restrictive systems by affording only property owners whose land is affected standing to challenge the actions of the taxing agencies. The Texas legislature and courts have historically been hostile to taxpayer challenges to most aspects of the taxation system. As

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"involve[s] a legal issue of continuing public interest," and "ad valorem taxes are assessed and levied throughout the State of Texas and many lienholders are of the misconception that they are [entitled to notice of the appraisal and assessment and an opportunity to contest it]."

observed by Mark Yudof, the dean of the University of Texas School of Law[8],

> [The Texas Courts] have imposed upon themselves a remedial framework, which at times jeopardizes the financing of public services without making any progress toward compliance with constitutional and statutory dictates. In short, courts must bear a significant share of the blame for the lawless and inequitable operation of the Texas property tax system.
>
> . . . They show little inclination to exercise their judicial powers in a forceful fashion to bring a halt to the lawless activities of assessors, local governing bodies, and boards of equalization.

Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Tex. L. Rev. 885, 896 (1973).

Several states take a middle ground and allow a person "aggrieved" to contest the assessment. *E.g.*, Kansas Stat. Ann. § 79-1409 (1984) ("any person feeling aggrieved" may appeal); N.Y. Real Prop. Tax Law § 704 (McKinney 1984) ("aggrieved" person may seek judicial review of assessment); Va. Code Ann. § 58.1-3350 (Supp. 1989) ("any person aggrieved by an assessment may apply for relief"); Wyo. Stat. § 39-1-305 (1985) ("[a]ny person aggrieved by any assessment may apply for relief"). Massachusetts expressly allows a mortgagee who pays at least one-half of the tax to challenge the assessment. Mass. Gen. Laws Ann. ch. 59, § 59 (West 1988), *amended by* Act approved Aug. 15, 1989, ch. 341, § 38, 1989 Mass. Legis. Serv. 711, 715 (West).

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[8] Dean Yudof's observations predated the enactment of the Texas Tax Code. As discussed below, however, they are equally applicable to the current system.

Some of these systems clearly preclude a challenge by a person whose property interests are diminished by a taxing authority's actions. *Cf., In re Suburbia Fed. Sav. & Loan Ass'n v. Mayor*, 76 A.D.2d 841, 428 N.Y.S.2d 323, *appeal denied*, 52 N.Y.2d 702, 417 N.E.2d 1013, 436 N.Y.S.2d 1026 (1980) (mortgagee is not "aggrieved" person and cannot challenge tax assessment on property unless it demonstrates that it cannot recover the tax from the property or through a deficiency judgment); *Choate v. Board of Assessors*, 304 Mass. 298, 23 N.E.2d 882 (1939) (mortgagee cannot challenge assessment unless it first pays the tax). This is an appropriate case by which the Court can provide uniform guidance as to the Fourteenth Amendment's limits on the State's ability to affect vested rights without notice or an opportunity to be heard. If the Court declines this opportunity, regardless of how the states couch their standing requirements for challenging a taxing agency's actions, due process protections for those whose property interests are significantly affected may be ignored, as in this case.

B. The Texas system denies the lienholder due process.

Without question, due process requires that a landowner must be afforded some opportunity to challenge the administrative action of a taxing agency that increases the appraised value of land and, correspondingly, the tax assessed, because such actions result in the land being burdened by a lien to secure the increased tax. *E.g., Turner v. Wade*, 254 U.S. 64 (1920); *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U.S. 323 (1906). Importantly, the landowner is entitled to an opportunity to

contest the State's actions *before* his property interests are diminished. *Id.*

There is no legal or practical justification for treating differently the mortgagee, who is deprived of its priority lien interest in the land through imposition of the superior tax lien. That is especially true since a "mortgagee's interest may, and often does, exceed the owner's interest in the property." *Seattle-First Nat'l Bank v. Umatilla County*, 77 Or. App. 283, 713 P.2d 33, 36, *review denied*, 300 Or. 704, 716 P.2d 758 (1986).

In *Mennonite*, this Court categorically held the mortgagee's interest in the land, like the landowner's, is a protected property interest that cannot be diminished by the imposition of a superior tax lien without affording the mortgagee notice and a meaningful opportunity to contest the action. This Court "recognized that prior to an action which will *affect* [a lienholder's interest], a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Mennonite*, 462 U.S. at 795 (emphasis added).

Moreover, this Court has recently confirmed that, contrary to the holding of the Texas court in this case, the State must afford due process to those whose property interests it adversely affects in any way. In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the Court held that, while the State's action in holding a tax sale in *Mennonite* "did not even completely extinguish the mortgagee's claim, it merely 'diminish[ed] the value' of the interest; nevertheless, that deprivation required that due process be afforded." *Id.*, 108 S. Ct. at 1344, 1346.

Thus, a "deprivation" triggering due process protections occurs whenever the lienholder's property interest is "adversely affected" by state action.

These fundamental concepts of due process and fairness are not novel or of recent vintage. *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case.") Thus, before the State takes some action directed at diminishing a specific property interest, it must provide the interest owner an opportunity to "present its objections" and contest the proposed action in some meaningful way. *Mennonite*, 462 U.S. at 795.

The patent manner in which the Texas scheme deprives a lienholder of due process is graphically illustrated by this case. Bellaire's property interest (its first lien) was adversely affected and diminished to the extent of the increased appraisal and corresponding increase in taxes assessed, which became automatically secured by a superior statutory lien. In this case, the property valuation and taxes assessed were significantly increased without affording Bellaire even the opportunity to protest, and Bellaire's interest was correspondingly diminished to the extent of the lien securing the taxes assessed.[9] As the Texas court held in this case, however, under Texas law

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[9] State of Texas – County of Harris conceded in the Texas court of appeals that the lien and the 1985 taxes it secured would have been reduced if the appraisals and assessments

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Bellaire had no right to notice or a right to contest the agency's actions either at the administrative level or in court. *Huffman*, 770 S.W.2d at 573; *see also Bennett-Barnes Invs. Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 208 (Tex. App. – Eastland 1985, writ ref'd n.r.e.) (only the property owner can contest the appraisal, assessment, and imposition of the lien.) Only the landowner is afforded that opportunity.[10] Indeed, Bellaire was precluded by summary judgment from contesting the extent of the tax lien in this case.

Since under *Mennonite* and *Pope*, Bellaire's lien constituted a protected property interest that was diminished by the actions of the Respondent taxing authorities and by operation of law, it was denied due process when it

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had been challenged. Brief of State of Texas – County of Harris in court of appeals at 14. This fact is confirmed by the significant reduction in the appraisal in 1986 when Bellaire, which had become owner of the property, contested it.

[10] As stated above, the remedies provided in the Tax Code are exclusive. Tex. Tax Code Ann. § 42.09 (Vernon Supp. 1990). The Texas Supreme Court has even held that a person who is not the owner of the property subject to the tax had no remedy outside those prescribed in the Code to raise non-ownership as a defense. *Robstown Indep. School Dist. v. Anderson*, 706 S.W.2d 952 (Tex. 1986). Following *Robstown*, however, the Legislature made an exception to the exclusivity provisions of section 42.09 and provided that a "person" sued for delinquent taxes could defend on the ground that he did not own the property subject to the tax. That amendment may have remedied the constitutional infirmities in the tax scheme in that specific context, but only emphasizes the scheme's unconstitutionality as applied to lienholders.

was precluded from presenting any objections. Empty notice that the superior tax lien already established is about to be foreclosed, without an opportunity to contest the State's actions, does not comport with the principles of *Mennonite* or the Fourteenth Amendment.

C. The Texas court of appeals failed to recognize Bellaire's protected property interest that was affected by the Texas tax scheme and misconstrued *Mennonite*.

The court of appeals' analysis of the due process issue is fundamentally flawed. That court held that Bellaire was not deprived of any property interest since the taxes were not assessed against it "personally," but rather against the owner. *Huffman*, 770 S.W.2d at 573. That is, the court reasoned that Bellaire was not personally liable for the taxes, and therefore had no property interest that was affected by the increased tax assessment.

This analysis is predicated upon a misunderstanding of the property interest at stake, and ignores the real impact of the tax assessment and lien under the Texas statute. Bellaire had a real and substantial interest in the property by virtue of its deed of trust lien, which attached prior in time to any action by the Respondent taxing authorities. When the property was reappraised and the taxes increased, the statutory tax lien superior to the lien held by Bellaire arose automatically and significantly diminished Bellaire's interest. It is Bellaire's interest in the property that is at stake, not its personal liability to the taxing agency for the taxes. Bellaire's property interest was expressly recognized in *Mennonite*, as was its entitlement to constitutional protection.

Moreover, when, as in this case, the owner ignores the assessment process and refuses to pay the taxes, as a practical matter the lienholder has only two choices: it must pay the taxes or lose its interest in the property.[11] For this reason, the lienholder is no less the "party assessed" than is the property owner. The only difference in their respective liability for the tax, once it becomes final and the statutory lien attaches, is the pool of property against which payment may be enforced. At that point, of course, not even the owner can contest the tax liability. To hold, as the court of appeals did in this case, that a lienholder is not entitled to due process protections because it is not the "party assessed" is erroneously literal and completely ignores the dramatic effect of the statutory tax lien on the lienholder's constitutionally protected interest.

Moreover, the court of appeals' analysis in that regard is squarely at odds with *Mennonite*. In the Texas court's view, *Mennonite* requires at most that notice be given to lienholders only when the State is about to foreclose its tax lien, and not during the appraisal and assessment process, and that *Mennonite* does not require the State to afford lienholders an opportunity to protest. That interpretation, however, cannot be reconciled with the facts of the *Mennonite* case.

Under the Indiana taxation scheme involved in *Mennonite*, the "tax sale" was not a sale at all in the conventional sense; it merely gave the taxing authority (or other

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[11] The right of redemption in Texas is available only to the owner of the property. Tex. Tax Code Ann. § 34.21 (Vernon 1982).

"purchaser" at the "sale") a lien on the property superior to that of the contractual lienholder. Title did not pass, and the lienholder's interest was not extinguished, until the expiration of a two-year redemption period. This Court determined, however, that the attachment of this lien through the "tax sale" so affected the lienholder's property interest that due process protections were required. The Court stated:

> The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors.

Mennonite, 462 U.S. at 798.

This Court also reaffirmed in *Mennonite* the well-settled principle that due process must be afforded *prior to* an action which will affect an interest in property:

> [n]otice by mail or other means as certain to ensure actual notice is a *minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice . . . .

Mennonite, 462 U.S. at 800 (first emphasis added).

The "tax sale" condemned in *Mennonite* is virtually identical in the pertinent respects to the administrative process under the Texas system. Both result in the imposition of a super-priority lien with power of sale, which in each case diminishes the interests of those holding liens that predate the State's tax lien. Both deprive those lienholders of their protected interests without notice or an opportunity to be heard. Both are unconstitutional.

It is insufficient simply to notify a lienholder that its interest has been diminished, yet that is precisely the effect of the decisions of the Texas courts in this case. Instead, to comport with constitutional requirements the lienholder must receive notice and an opportunity to contest the tax liability before it becomes final. The Texas system precludes these fundamental rights and is constitutionally infirm.

D. The taxing authorities' contention that affording due process to lienholders imposes too great an administrative burden was rejected in *Mennonite* and is wrong.

In the Texas courts, Respondents contended that to provide to lienholders notice and an opportunity to be heard is too great a burden. That argument, however, was expressly rejected in *Mennonite*. There, this Court held that due process must be given to lienholders whose identities are reasonably ascertainable. *Mennonite*, 462 U.S. at 798. This Court noted that a simple search of the real property records should reveal the identity of the lienholder and that notice may be easily and economically afforded through the mail. *Id.* That is not too great a burden when, as here, significant property interests are at stake.[12]

Moreover, if the taxing authority finds even those minimal due process protections required by *Mennonite* too onerous, there is an alternative. The due process

---

[12] As noted above, some states allow *any* taxpayer standing to challenge any assessment and apparently do not find it too great an administrative burden.

safeguards come into play only because the taxing authority wants its lien to jump to the head of the queue. If the tax lien is relegated to its place in line behind earlier liens, then the lienholder's interests are not threatened, and there is no need for due process protections.

The Fourteenth Amendment would permit a tax lien to have priority over the liens of any earlier lienholders who were given proper notice of, and a meaningful opportunity to contest, the assessment of the tax or the imposition of the lien, but it requires that the tax lien be subordinate to the liens of those who were not given such notice and opportunity. Thus, under such a system, the taxing authority can very practically decide whether it wants to pay a minimal price for a priority lien, and act accordingly.

In most cases, the taxing agency will collect the tax from the landowner, and may for that reason determine not to send notice to lienholders. If notice is sent to the lienholder, the taxing authority may find that few lienholders will challenge the assessment, and may therefore conclude that it will suffer little other than postage costs by giving notice, and elect to do so. In all likelihood, only a very few cases will result in challenges from lienholders, and the taxing agency may sidetrack every such challenge merely by acknowledging the subordinate status of its own lien. Each step of the way, the taxing agency will have determined the investment it is willing to make in a priority lien, and the administrative burden may be light indeed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and judgment rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceedings.

Respectfully submitted,

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

and

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner
First National Bank of Bellaire

*Counsel of Record

APPENDIX A

Affirmed and Opinion filed February 23, 1989.

[Seal]

IN THE
FOURTEENTH COURT OF APPEALS

NO. A14-88-00352-CV

FIRST NATIONAL BANK OF BELLAIRE, Appellant

V.

HUFFMAN INDEPENDENT SCHOOL DISTRICT, ET. AL., Appellees

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 86-32290

OPINION

In this case involving the collection of ad valorem taxes, First National Bank of Bellaire ("the Bank") alleges that portions of the Property Tax Code are unconstitutional. In three points of error the Bank claims (1) the provision of the Property Tax Code which provides for notice of the appraised value of property to only the property owner is unconstitutional; and (2) the term "property owner" in the Property Tax Code should be construed to include a lienholder. We affirm.

In July 1986 Huffman Independent School District ("Huffman") filed suit against I. T. May, Jr. to collect delinquent ad valorem taxes on several tracts of property

located in Huffman, Texas. The taxes were unpaid for the 1985 tax year when May was the owner of the property and the Bank was the lienholder. On January 7, 1986, the Bank foreclosed on a 379.74 acre tract of land, on which delinquent taxes were owed by May. Huffman brought the Bank, as the new owner of the property, into its suit for delinquent taxes.

Huffman and the Bank then filed motions for summary judgment. Huffman's motion alleged Huffman was entitled to judgment as a matter of law because there was no dispute that the Bank owned an interest in the property and that property taxes were due on the property. The bank's motion alleged that the failure of the taxing authority to provide proper notice of the appraised value of the property deprived the Bank of the opportunity for a hearing to protest the appraised value, assessment, and agricultural use exemption. The trial court granted Huffman's motion for summary judgment and denied the Bank's motion.

In its first and second points of error the Bank claims it was denied due process because it did not receive notice of the taxable value and assessment of the property before the tax became final. The Bank claims the Texas Property Tax Code denies a lienholder due process of law by failing to provide for notice to the lienholder of appraised value.

The Texas Property Tax Code provides that an appraisal review board must give notice to a property owner of the appraised value of his land. TEX. PROP. TAX CODE ANN. § 25.19 (Vernon 1982). The Bank contends that

by failing to prescribe notice to a lienholder, the property code is unconstitutional as a deprivation of due process.

The notice provisions, the method to contest valuations and taxes, and the procedures for judicial review contained in the Texas Property Tax Code afford complete due process protection to a property owner. *Brooks v. Bacchus*, 661 S.W.2d 288, 290 (Tex. App. – Eastland 1983, writ ref'd n.r.e.). In matters of taxation, the requirement of due process is satisfied if the party assessed is given an opportunity to be heard before some assessment board at some stage of the proceedings. *Texas Pipeline Co. v. Anderson*, 100 S.W.2d 754, 762 (Tex. Civ. App. – Austin 1937, writ ref'd). Since ad valorem taxes are only assessed against property owners, not lienholders, due process does not require notice be given to all lienholders.

The Bank claims *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) is dispositive of this appeal. That case states:

> Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. [Citations omitted] When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service.

Id. at 798.

Huffman and the county fully complied with the *Mennonite* case. *Mennonite* requires notice of a pending tax sale be given to a mortgagee. It is undisputed in this case that the Bank was given notice of the tax sale and

has been afforded an opportunity to be heard prior to the tax sale. The Bank's first and second points of error are overruled.

In its third point of error the Bank claims the trial court erred in "summarily holding that the phrase 'property owner,' " does not include a lienholder. Property owner has been defined as "an owner of property." Owner is defined as "one who owns; a proprietor, one who has the legal or rightful title, whether the possessor or not." *Bennett-Barnes Investments Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 208, 209 (Tex. App. – Eastland 1985, writ ref'd n.r.e.). A lienholder does not own legal title to the property on which he holds a lien. *Bankers Home Bldg. & Loan Ass'n v. Wyatt*, 139 Tex. 173, 162 S.W.2d 694, 696 (1942). A lienholder is not a property owner. The Property Tax Code requires notice only be given to a property owner, and since, in 1985, the Bank was not a property owner, the Property Tax Code does not require notice, valuation and assessment be given to the Bank as lienholder. The Bank's third point of error is overruled.

The judgment of the trial court is affirmed

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed February 23, 1989.
Panel consists of Chief Justice J. Curtiss Brown and Justices Junell and Draughn.
Do not publish. TEX. R. APP. P. 90.

APPENDIX B

February 23, 1989.

[Seal]

JUDGMENT
THE FOURTEENTH COURT OF APPEALS

FIRST NATIONAL BANK
OF BELLAIRE, APPELLANT

NO. A14-88-00352-CV V.

HUFFMAN INDEPENDENT SCHOOL
DISTRICT, ET. AL., APPELLEES

This cause, an appeal from the judgment in favor of Huffman Independent School District, et. al. signed March 1, 1988, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below affirmed.

We order First National Bank of Bellaire and its surety, Reliance Insurance Company, jointly and severally, to pay (1) all costs incurred by reason of this appeal, (2) the sum or sums adjudged to appellee plus interest at the legal rate from the date of the trial court judgment until paid, and (3) all costs that appellee has incurred, both in this court and in the court below. This decision is ordered certified below for observance.

APPENDIX C

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTIS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
JUSTICES

MARY JANE SMART
CLERK

HELEN A. CASSIDY
CHIEF STAFF
ATTORNEY

PHONE
713-655-2800

March 23, 1989

Hon. Decatur J. Holcombe
Royston, Rayzor, Vickery & Williams
2200 Texas Commerce Tower
Houston, TX 77002

Hon. Michael J. Darlow
Prappas & Darlow
3120 Southwest Freeway
Suite 412
Houston, TX 77098

Hon. John G. Garza
Assistant County Attorney
1001 Preston
Suite 634
Houston, TX 77002

RE: CASE NO. 14-88-00352-CV TRIAL COURT CASE NO. 86-32290

STYLE: First National Bank of Bellaire
V: Huffman Independent School District

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 24, 1989.

Respectfully yours,
MARY JANE SMART, CLERK
By /s/ Charlene Mitchell
Deputy

APPENDIX D

IN THE SUPREME COURT OF TEXAS

June 28, 1989

NO. C-8656,	)	
FIRST NATIONAL BANK OF BELLAIRE	)	From HARRIS County, Fourteenth District
vs.	)	
HUFFMAN INDEPENDENT SCHOOL DISTRICT and THE STATE OF TEXAS – COUNTY OF HARRIS	)	

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, First National Bank of Bellaire, and surety, Reliance Insurance Company, pay all costs incurred on this application.

APPENDIX E

IN THE SUPREME COURT OF TEXAS

NO. C-8656,	)	October 11, 1989
FIRST NATIONAL BANK OF BELLAIRE	)	From HARRIS County, Fourteenth District
vs.	)	
HUFFMAN INDEPENDENT SCHOOL DISTRICT and THE STATE OF TEXAS - COUNTY OF HARRIS	)	

Petitioner/s motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX F

NO. 86-32290

HUFFMAN INDEPENDENT SCHOOL DISTRICT	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
I. T. MAY, JR., TRUSTEE	§	215TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT

ON THE 21st day of January, 1988, the Court heard the Plaintiff's, HUFFMAN INDEPENDENT SCHOOL DISTRICT and Intervenor's, STATE OF TEXAS AND COUNTY OF HARRIS Motion for Summary Judgment and the Defendant's FIRST NATIONAL BANK OF BELLAIRE Motion for Summary Judgment; The parties appeared by and through their respective counsel, and having examined the pleadings and the summary judgment evidence and having heard the arguments of counsel; the Court finds that the Motion for Summary Judgment of the Defendant should be denied and that the HUFFMAN INDEPENDENT SCHOOL DISTRICT and the STATE OF TEXAS AND COUNTY OF HARRIS are entitled to Summary Judgment in their favor upon the hereinafter described property, located in Harris County, Texas, to-wit:

> Tract two (2), consisting of 379.74 acres in Abstract Sixty-two (62), John R. Rhea Survey, located in Harris County, Texas.

It is therefore ORDERED, ADJUDGED and DECREED that the Plaintiff, HUFFMAN INDEPENDENT SCHOOL DISTRICT, recover the following aggregate sum of *$24,736.67* due for the tax year *1985;* inclusive, for delinquent ad valorem taxes, penalties and interest upon the described property owned by said Defendant, and that said aggregate sum of money shall bear interest from the date of this Judgment until paid at the rate of Ten (10%) percent per annum and for such Court costs as may be provided by law.

It is further ORDERED, ADJUDGED and DECREED that the Intervenor, STATE OF TEXAS AND COUNTY OF HARRIS, recover the following aggregate sum of *$7,628.63* for the tax year *1985;* for delinquent ad valorem taxes, penalties and interest upon the described property owned by said Defendant, and that said aggregate sum of money shall bear interest from the date of this Judgment until paid at the rate of Ten (10%) percent per annum and for such Court costs as may be provided by law.

It is further ORDERED, ADJUDGED and DECREED that the Intervenor, STATE OF TEXAS AND COUNTY OF HARRIS, does have and recover the sum of *$1,144.29,* as reasonable attorney's fees, which said sum equals fifteen (15%) percent of the total amount of taxes, penalty and interest recovered in this suit; and shall bear interest at the rate of Ten (10%) percent per annum until paid.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff, HUFFMAN INDEPENDENT SCHOOL DISTRICT does have and recover the sum of THIRTY-SEVEN and 50/100 ($37.50) DOLLARS, such amount being the reasonable expenses incurred by Plaintiff for

procuring data and information as to the name, identity and location of necessary parties and for procuring necessary legal description of the property herein above described.

It is further ORDERED, ADJUDGED and DECREED that the Tax Master, MARK DAVIDSON appointed by this Court be awarded the sum of $75.00 as a masters fee to taxed as court costs.

It is further ORDERED that first, paramount and superior tax liens against the above described parcel or parcels of land for the aggregate amount of taxes, penalties, interest and costs hereinabove adjudged to be due thereon to Plaintiff and Impleaded Party Defendant together with all costs of suit due each and all of said parties and all other costs authorized by law, which liens are hereby separately foreclosed upon said parcel of land for said aggregate amounts hereinabove set out, and all other costs authorized by law.

It is further ORDERED that an Order of Sale be issued by the Clerk of this Court, directed to the Sheriff or Constable of Harris County, Texas, commanding such officer to seize, levy upon, advertise for sale and sell as under execution, the above described parcel or parcels of land, and all the right, title and interest of the Defendant hereinabove named therein, at public auction, to the highest bidder for cash, as provided by law, and said property shall be sold free and clear of all liens held by the Defendant hereinabove named, as same are hereinabove set out, provided this Judgment and the foreclosure of Plaintiff's and Impleaded Party Defendant's

tax liens, as set out above, are without prejudice to Plaintiff's and Impleaded Party Defendant's tax liens for taxes which have accrued or become delinquent since the filing of this suit, and the property involved herein shall be sold without prejudice to said tax liens, and further provided, however, that said property shall not be sold to the owner thereof directly or indirectly, or to anyone having an interest therein, or to any party other than a taxing unit which is a party to this suit for less than the amount of the adjudged value of said property or the aggregate of the amounts of the Judgments against said property, whichever is lower. Said adjudged value or reasonable fair value of the property hereinabove described at the time of trial, as set by this Court in accordance with the requirements of law, is as follows: $949,330.00

It is further ORDERED that the owner of such property, or anyone having an interest herein, or their heirs, assigns, or legal representatives, may within two (2) years from the date of such sale, redeem said property, as provided by law, and in addition to redeeming direct from the purchase, redemption may also be made from the Tax Collector of the County in which said property was sold, in the event that the purchaser at the tax sale cannot be located, as provided by law.

It is further ORDERED that the officer executing the Order of Sale shall make proper conveyance to the purchaser or purchasers of said land, under and by virtue of said sale, or to any other person to whom the purchaser may direct the conveyance to be made, upon their compliance with the terms of sale, in which such deed, the right of redemption, as provided by law, shall be expressed and said sale made subject thereto.

It is further ORDERED that the Clerk of this Court shall withhold the issuance of a writ of possession to the land above described and ordered sold, or any party thereof, until the expiration of the period of redemption fixed by law, and if, before the expiration of said period of redemption, no person who is entitled to redeem the said property has exercised the right of redemption, then, at that time, a writ of possession shall immediately be issued by the Clerk of this Court, ordering the Sheriff or other proper officer to place the purchaser or purchasers, or their heirs, executors, assigns or administrators, in possession of the property so purchased, or any part thereof, at the sale provided for in this Judgment.

If the property herein described is sold to any taxing unit which is a party to this suit, the title to said property shall be bid in and held by the taxing unit purchasing same for the use and benefit of itself and the other taxing units which are parties to this suit and which have been adjudged in this suit to have tax liens against said property. Said property to be sold by said purchasing taxing unit in the manner provided by law and the proceeds of said sale to be distributed to the taxing units that are parties to this suit in the manner as provided by law.

It is further ORDERED, ADJUDGED and DECREED that the purchaser of the property herein described shall take title free and clear of all liens and claims for ad valorem taxes against said property delinquent at the time of Judgment in said suit to any taxing unit which is a party to this suit, or which has been served with citation in this suit as required by law.

SIGNED this the 1st day of March, A.D., 1988.

The District clerk is ordered to prepare a cost bill only upon the request of a party or of an officer with uncollected costs outstanding.

/s/ Eugene Chambers
Judge Presiding

APPROVED AS TO FORM:

PRAPPAS & DARLOW, P. C.

/s/ Michael J. Darlow
By: MICHAEL J. DARLOW
Attorney for Plaintiff
3120 Southwest Freeway
Suite 412
Houston, Texas 77098
(713) 526-3439
Bar Card No. 05387300

STATE OF TEXAS,
COUNTY OF HARRIS

/s/ John G. Garza
By: JOHN G. GARZA
Assistant County Attorney
1001 Preston #634
Houston, TX 77002
(713) 221-5101
Bar Card No. 99999996

ROYSTON, RAYZOR,
VICKERY & WILLIAMS

/s/ Mark J. Airola
By: MARK J. AIROLA
2200 Texas Commerce
Tower
Houston, Texas 77002
(713) 224-8380
Bar Card No. 00951100
Attorney for Defendant,
FIRST
NATIONAL BANK
OF BELLAIRE

APPROVED AS TO
FORM ONLY

/s/ Sharon L. Michaels
By: Sharon L. Michaels
3050 Post Oak Blvd
#1700
Houston, TX 77056
(713) 623-6443
Bar Code # 14006750
Attorney for
Huffman Bank

NO. 89-1117 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST NATIONAL BANK OF BELLAIRE,
Petitioner

v.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

RESPONDENT, HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

MICHAEL J. DARLOW
PRAPPAS, DARLOW &
CHILDERS, P.C.
3120 Southwest Freeway #412
Houston, Texas 77098
713/526-3439
Attorneys for Respondent, Huffman Independent School District

March 21, 1990

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment mandates that a lienholder be afforded the same rights as a property owner to receive notice of and an opportunity to contest the appraisal, assessment, and exempt or non-exempt status of the property owner's property, without the permission of the property owner.

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UNITED STATES CONSTITUTION

NO. 89-1117

IN THE

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OCTOBER TERM, 1989

FIRST NATIONAL BANK OF BELLAIRE,
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v.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

RESPONDENT, HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

To The Supreme Court of the United States:

The Respondent, Huffman Independent School District ("Huffman"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the opinion rendered by the Court of Appeals for the Four-

teenth Supreme Judicial District of Texas ("Fourteenth Court of Appeals"). That opinion is reported at 770 S.W.2d 571 (Tex. App.—Houston [14th Dist.] 1989, writ denied), and is reprinted in the appendix to the petition for writ of certiorari ("petition") at page 1a.

LACK OF JURISDICTION

On January 16, 1990, Petitioner, FIRST NATIONAL BANK OF BELLAIRE ("BELLAIRE"), voluntarily paid TWENTY NINE THOUSAND ONE HUNDRED ONE AND 97/100 DOLLARS ($29,101.97) to Respondent, HUFFMAN, in full and final payment of all delinquent ad valorem taxes, including penalties and interest, owed to HUFFMAN.[1] Since full payment was made, the issues raised by BELLAIRE against HUFFMAN are moot. Accordingly, the Court does not have jurisdiction to hear this case.

Texas has long followed the voluntary payment rule, that is, a tax voluntarily paid cannot be recovered, even if illegally imposed or collected pursuant to an allegedly unconstitutional tax statute.[2] *See Texas Nat'l Bank of Baytown v. Harris County,* 765 S.W.2d 823 (Tex. App. —Houston [14th Dist.] 1988, writ denied). The "voluntary payment" rule applies to cases challenging tax payments made pursuant to V.T.C.A., Tax Code §§ 1.01 *et seq.* (Vernon 1982 and Supp. 1990) ("Tax Code"), the very Tax Code at issue in this case. *See Id.; First*

---

1. Attached as Appendix A is the tax receipt evidencing BELLAIRE's voluntary payment of the very taxes BELLAIRE claims it should not have to pay.

2. Although there are certain exceptions to the voluntary payment rule, none are applicable herein.

Bank of Deer Park v. Deer Park Ind. School Dist., 720 S.W.2d 849 (Tex. App.—Texarkana 1989, no writ); *Hunt County Tax Appraisal Dist. v. Rubbermaid, Inc.*, 719 S.W.2d 215 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Salvaggio v. Houston Ind. School Dist.*, 709 S.W. 2d 306 (Tex. App.—Houston [14th Dist.] 1986, writ dism'd).

Once taxes are voluntarily paid, *all* questions regarding their validity are moot.[3] *Texas Nat'l Bank of Baytown, supra.* It is axiomatic that the jurisdiction of this Court cannot be invoked to adjudicate a moot claim. As recognized by this Court in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, et al v. Missouri,* 361 U.S. 363, 367-68 (1960):

> [T]he duty of this Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." [citations omitted] To express an opinion upon the merits of the appellants' contentions would be to ignore the basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed.

The same is true in this case. Accordingly, the Court should deny the petition.

---

3. BELLAIRE is well aware of this law. Two of BELLAIRE's affiliates, First Bank of Deer Park and Texas Nat'l Bank of Baytown, through similar counsel, Royston, Rayzor, Vickery & Williams, were involved in cases where the Texas Courts recognized the validity of the "voluntary payment" rule. *See Texas Nat'l Bank of Baytown v. Harris County, supra;* and *First Bank of Deer Park v. Deer Park Ind. School Dist., supra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following sections are added to the constitutional and statutory provisions set forth in the petition:

Section 1.07 of the Tax Code provides:

> *Delivery of Notice.* (a) An official or agency required by this title to deliver a notice to a property owner may deliver the notice by regular first class mail, with postage prepaid, unless this title requires a different method of delivery.
>
> (b) The official or agency shall address the notice to the property owner or, if appropriate, his agent at his address according to the most recent record in the possession of the official or agency. However, if a property owner files a written request that notices be sent to a particular address, the official or agency shall send the notice to the address stated in the request.
>
> (c) A notice permitted to be delivered by first-class mail by this section is presumed delivered when it is deposited in the mail. This presumption is rebuttable when evidence of failure to receive notice is provided.

Section 1.11 of the Tax Code provides:

> *Communication to Fiduciary.* (a) On the written request of a property owner, an appraisal office or an assessor or collector shall deliver all notices, tax bills, and other communications relating to the owner's property or taxes to the owner's fiduciary.
>
> (b) A request pursuant to this section remains in effect until revoked by the owner.

Section 6.01 of the Tax Code provides:

> *Appraisal District Established.* (a) An appraisal district is established in each county.

(b) The district is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.

(c) An appraisal district is a political subdivision of the state.

Section 11.01 of the Tax Code provides in relevant part:

(a) All real and tangible personal property that this state has jurisdiction to tax is taxable unless exempt by law.

Section 22.01 of the Tax Code provides:

Rendition Generally. (a) Except as provided by Chapter 24 of this code, a person shall render for taxation all tangible personal property used for the production of income that he owns or that he manages and controls as a fiduciary on January 1.

(b) When required by the chief appraiser, a person shall render for taxation any other taxable property that he owns or that he manages and controls as a fiduciary on January 1.

(c) A person may render for taxation any property that he owns or that he manages and controls as a fiduciary on January 1, although he is not required to render it by Subsection (a) or (b) of this section.

(d) A fiduciary who renders property shall indicate his fiduciary capacity and shall state the name and address of the owner.

Section 23.01 of the Tax Code provides:

Appraisals Generally. (a) Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1.

(b) The market value of property shall be determined by the application of generally accepted appraisal techniques, and the same or similar appraisal techniques shall be used in appraising the same or similar kinds of property. However, each property shall be appraised based upon the individual characteristics that affect the property's market value.

Section 23.43 of the Tax Code provides in relevant part:

Application. (a) An individual claiming the right to have his land designated for agricultural use must apply for the designation each year he claims it. Application for the designation is made by filing a sworn application form with the chief appraiser for the appraisal district in which the land is located.

(b) A claimant must deliver a completed application form to the chief appraiser before May 1 and must furnish the information required by the form. For good cause shown the chief appraiser may extend the deadline for filing the application by written order for a single period not to exceed 60 days.

(c) If a claimant fails to timely file a completed application form in a given year, he may not receive the agricultural designation for that year.

Section 23.73 of the Tax Code provides in relevant part:

Appraisal of Qualified Timber Land. (a) The appraised value of qualified timber land is determined on the basis of the category of the land, using accepted income capitalization methods applied to average net to land. The appraised value so determined may not exceed the market value of the land as determined by other appraisal methods.

Section 32.04 of the Tax Code provides:

Priorities Among Tax Liens. (a) Whether or not a tax lien provided by this chapter takes priority over

a tax lien of the United States is determined by federal law. In the absence of federal law, a tax lien provided by this chapter takes priority over a tax lien of the United States.

(b) Tax liens provided by this chapter have equal priority.

Section 32.07 of the Tax Code provides:

Personal Liability For Tax. (a) Except as provided by Subsection (b) of this section, property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed. A person is not relieved of the obligation because he no longer owns the property.

(b) The person in whose name a property is required to be listed by Section 25.13 or 25.15 of this code is personally liable for the taxes imposed on the property.

(NOTE: Sec. 25.15 has been repealed)

Section 41.44 of the Tax Code provides in relevant part:

Notice of Protest. (a) Except as provided by Subsections (b) and (c), to be entitled to a hearing and determination of a protest, the property owner initiating the protest must file a written notice of the protest with the appraisal review board having authority to hear the matter protested:

(1) before June 1 or not later than the 30th day after the date that notice was delivered to the property owner as provided by Section 25.19, whichever is later;

Section 41.46 of the Tax Code provides in relevant part:

Notice of Protest Hearing. (a) The appraisal review board before which a protest hearing is sched-

uled shall deliver written notice to the property owner initiating a protest of the date, time, and place fixed for the hearing on the protest. The board shall deliver the notice not later than the 15th day before the date of the hearing.

Section 41.411 of the Tax Code provides in relevant part:

> *Protest of Failure to Give Notice.* (a) A property owner is entitled to protest before the appraisal review board the failure of the chief appraiser or the appraisal review board to provide or deliver any notice to which the property owner is entitled.

Section 42.06 of the Tax Code in effect at the time provided:

> *Notice of Appeal.* (a) To exercise his right of appeal, a party must file written notice of appeal within 15 days after the date he receives the notice required by Section 41.47 or, in the case of a taxing unit, by Section 41.07 of this code that the order appealed has been issued.

Section 42.21 of the Tax Code provides in relevant part:

> *Petition For Review.* (a) A party who appeals as provided by this chapter must file a petition for review with the district court within 45 days after the party received notice that a final order has been entered from which an appeal may be had. Failure to timely file a petition bars any appeal under this chapter.

Article 8, Section 15 of the Texas Constitution provides:

> *Lien of Assessment; Seizure and Sale of Property.*
>
> The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the

> payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

Section 6-1.1-4-22 of the Indiana Code provides in relevant part:

> *Notice of Assessment or Reassessment Amounts to Taxpayer.* (a) If any assessing official or any board assesses or reassesses any real property under the provisions of this article, the official or board shall give notice to the taxpayer, by mail, of the amount of the assessment or reassessment.

STATEMENT OF THE CASE

BELLAIRE's statement of the case is convoluted, misleading, incomplete and inaccurate. Although the opinion below accurately sets forth the statement of facts in this case, to clarify and provide the Court with a complete picture of the case, HUFFMAN adds the following facts. The following facts are also necessary for purposes of completion and accuracy.

1. Overview of The Texas Taxation System

On January 1, of each year, a tax lien attaches to property to secure the payment of taxes. Tax Code § 32.01. All property (real and tangible personal property) in the State of Texas is taxable unless exempt by law. Tax Code § 11.01(a).

The duty of appraising property for ad valorem tax purposes rests with the Central Appraisal District ("CAD") of each county. Tax Code § 6.01. The CAD appraises the property at its market value as of January 1.

Tax Code § 23.01. By May 15th of each tax year, or as soon thereafter as practical, the Chief Appraiser of the CAD is required, under certain circumstances, to deliver written notice of the property's appraised value to the property owner.[4] Tax Code § 25.19.

Depending upon the usage of the land and other items, there are a variety of procedural steps a property owner can take to reduce the proposed value of his property as established by the CAD. For instance, the property owner has the right to "render" or establish the value of his own property. Tax Code § 22.01. If a property owner believes his property qualifies for a partial or total exemption from taxation, he may file an application requesting the exemption (i.e. religious exemption). Tax Code, Chapter 11. If a property owner believes his property qualifies for a special land use designation (i.e. agricultural or timber land), he may apply for such designation each year and, if granted, receive a reduced property valuation. Tax Code §§ 23.43(a), 23.73. Since taxes are assessed based upon the property's appraised value, a reduction in value, whether by exemption or special land use designation, necessarily reduces the amount of taxes due.

If the property owner disagrees with the appraised value of the property, the denial of an exemption or denial of a special use designation, he can protest to an Appraisal Review Board. Tax Code §§ 41.41, 41.44, & 42.06. If,

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4. While "property owner" is not defined in the Tax Code, it has been judicially defined as a proprietor or possessor of legal title in property. *Bennett-Barnes Invest. Co. v. Brown County Appraisal Dist.*, 696 S.W.2d 209 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). This definition was reaffirmed by the opinion below. *See First Nat'l Bank v. Huffman Ind. School Dist.*, 770 S.W.2d 571, 573 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

after appearing before the Appraisal Review Board, the property owner is still dissatisfied, he can file suit in the District Court in the county where the Appraisal Review Board is located. Tax Code § 42.21.

Although these procedures apply to a "property owner", the Tax Code permits the property owner to appoint a fiduciary or designated representative, such as a lienholder, to receive all notification, to file for the applicable exemption and/or special usage designation and to pursue all administrative remedies. Tax Code §§ 1.07, 1.11. Thus, BELLAIRE's claim that lienholders are excluded "as a matter of law" from this process is patently wrong and misleading. *See* petition at page 8.

Texas Courts have held that the notice provisions, the methods to contest valuations and taxes, and the procedures for judicial review contained in the Tax Code provide complete due process protection to a property owner. *Brooks v. Bacchus,* 661 S.W.2d 288, 290 (Tex. App.—Eastland 1983, writ ref'd n.r.e.). Since the Tax Code allows a lienholder, with the property owner's permission, to "step into the shoes" of the property owner vis-a-vis all notice and protest procedures, a lienholder is afforded complete due process protection.

2. Priority of a Tax Lien

On January 1 of each year, a tax lien attaches to property to secure the payment of taxes. Tax Code § 32.01. It is a priority lien, not a "super-priority" lien as coined by BELLAIRE, which takes precedent over all other liens in existence, save and except, where applicable, federal tax liens. Tax Code §§ 32.01, 32.04, 32.05 and Tex. Const., Art. 8, § 15 (Vernon 1955). The existence and priority position of a tax lien does not

adversely affect a lienholder's interest in property: it merely prioritizes the liens, thereby ensuring that the tax is paid to the respective taxing authority without fear of the tax lien being eliminated by a lienholder who may precipitously foreclose on the property.

BELLAIRE claims that because a tax lien is a priority lien, any increase in tax liability correspondingly diminishes the value of its interest in the property. *See* petition at page 6. BELLAIRE's contention is without merit.[5] BELLAIRE's attempt to correlate the priority of a tax lien to a decrease in property value is nonsensical. *See* petition at page 17.

3. The Present Case

This case involves the collection of ad valorem taxes. HUFFMAN filed suit against I. T. May, Jr., Trustee ("MAY") for the collection of delinquent ad valorem taxes on several tracts of real property located in Huffman, Harris County, Texas. Subsequently, HUFFMAN learned BELLAIRE had foreclosed upon a portion of the land previously owned by MAY (379.74 acres), and BELLAIRE was thereafter made a party to the suit.

The only taxes involved in this case are for tax year 1985, when MAY was owner and BELLAIRE was lienholder. In 1984, MAY applied for and received an agricultural use designation pursuant to § 23.43 of the Tax Code. This designation reduced the appraised value of

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5. Assume a parcel of property is valued at $100,000 and taxes are assessed at $1.00 per $100 of value. Assume a lienholder has a $90,000 lien on the property. Taxes due are $1,000. Next, assume the property value increases to $150,000. Taxes at $1.00 per $100 of value equal $1,500. Lienholder's $90,000 lien has not "of course" been diminished. Rather, the lienholder is even more secure since the property value has increased.

the property for tax year 1984 and thus, the amount of taxes due was significantly reduced. In 1985, MAY failed to apply for the agricultural use designation; without this credit, MAY's 1985 taxes increased. MAY failed to pay those taxes and this suit was instituted.

BELLAIRE's claim that it did not receive notice when "Respondent taxing units increased the appraised value of real property upon which BELLAIRE had a prior deed of trust lien", is belied by the true facts of this case. First, HUFFMAN has nothing to do with increasing the appraised value of property. As explained above, that is *solely* the function of the CAD, which is not a party to this case.

More importantly, however, there is no evidence that the appraised value of the property was ever increased by the CAD. In fact, the appraised value of the property in question did not change from tax year 1984 to 1985. As the evidence demonstrates, and BELLAIRE admits, MAY's taxes increased solely because MAY failed to apply for an agricultural use designation—not because the appraised value increased in tax year 1985. Thus, the central facts upon which BELLAIRE's petition is predicated (HUFFMAN's failure to give BELLAIRE notice of an increase in the appraised value of the property in question) are false and bear no relation to the true facts of this case.

REASONS FOR DENYING THE WRIT

A. This is not a case of substantial nationwide importance.

Neither the decision below nor the record raises the issue presented by the petition. As explained above and

contrary to BELLAIRE's assertions (petition at 1-2), HUFFMAN did not increase the appraised value of the property in question. Pursuant to the Tax Code, only the CAD has the authority to appraise property. *See* Tax Code § 6.01. Further, the only evidence before the Court demonstrates that the tax liability was increased because MAY failed to file for an agricultural use designation—not because of any new appraisal by the CAD. In fact, the appraised value of the property did not change during the operative time period. Since the case below turns on its own facts and since the "facts" as represented by BELLAIRE are not accurate, this case cannot have nationwide significance.

Even if the facts were as BELLAIRE represents, which they are not, this case still does not present any issue of national import. HUFFMAN does not deny that, absent a request by the property owner, the Tax Code does not mandate that a "lienholder" receive notice of, or be afforded an opportunity to be heard during the assessment and valuation stage. However, Texas law is not an anamoly—nor is it unconstitutional.

The other states' statutes cited by BELLAIRE are, in large measure, inapposite to the crux of BELLAIRE's case: whether a lienholder is denied due process if he does not receive "notice" that the CAD reappraised his mortgagor's property. The statutes cited identify who has standing to contest the property's value—not who is entitled to receive notice of the appraised value. *See* petition at pages 13, 14 and 15.

Should BELLAIRE thus attempt to shift this case's focus from the question of "notice" *solely* to the question of "standing", although different "nouns" are utilized,

Texas law is again consistent with the laws of her sister states.

In Texas, a "property owner" is entitled to notice of and an opportunity to be heard during the valuation and assessment stages of the appraisal process. However, the property owner is not the only individual with "standing" in this regard. BELLAIRE fails to tell the Court that a lienholder, in fact, *any person* (whether they have an interest in the property or not) is entitled to receive notice of and an opportunity to be heard during the valuation and assessment stages of the appraisal process, provided that person has the permission of the property owner.[6] *See* Tax Code § 1.11. *See, e.g., MCI Communications v. Tarrant County,* 723 S.W.2d 350, 351 (Tex. App.—Fort Worth 1987, no writ) (the owner's representative represented the owner at the appraisal protest hearing); *First Union Real Estate v. Taylor County,* 758 S.W.2d 380 (Tex. App.—Eastland 1988, writ denied) (owner appointed fiduciary to "handle all matters relative to assessments"). Thus, with proper notice to the taxing authorities, a lienholder, such as BELLAIRE, can represent the owner for the mutual benefit of both. The statutes cited by BELLAIRE are consistent with Texas law.

B. The Tax Code Does Not Deny a Lienholder Due Process.

BELLAIRE seeks to void the tax lien against the subject property by claiming that it was denied due process since BELLAIRE, as lienholder, was not notified

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6. Since taxes are only the personal obligation of the property owner, it is not unreasonable to require that before a "stranger" to the transaction receives notice of the property owner's personal debt, the property owner must agree to the dissemination of such information.

of the property's appraised value, the property owner's failure to file an agricultural exemption and the amount and status of taxes due.[7] BELLAIRE pleads deprivation of some "substantial property right" since it was not notified of the fact and amount of taxes until after they became "final".

BELLAIRE does not contest that due process was afforded to MAY, the property owner, who was given full notice and opportunity to be heard to contest value, assessment and tax status, as well as full opportunity to file for an agricultural use designation. Nor does BELLAIRE contest that due process was afforded to it, as lienholder, and subsequently as owner, when it was made a party to the tax suit, thereby giving it notice of and an opportunity to be heard prior to the entry of any judgment which would adversely affect BELLAIRE's property rights.

Instead, under the guise of "due process" BELLAIRE is effectively requesting this Court to rewrite the Tax Code to mandate notice of and opportunity to contest the appraisal, assessment and exempt or non-exempt status of a property owner's property be afforded to *every* lienholder, *in addition to* the property owner, and without the owner's permission. BELLAIRE's request clearly exceeds the bounds of due process, common sense and "justice for all", and accordingly, must be denied.

The constitutionality of the Texas Property Tax Code has been upheld by the Texas Courts. *See Brooks, supra.* The notice provisions contained therein, the method to

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7. Even though BELLAIRE makes these assertions, it has voluntarily paid the taxes due HUFFMAN. Thus, any questions about the taxes validity are moot.

contest valuations and taxes, and the procedures for judicial review, afford complete due process protection to a property owner. *See Brooks, supra.* This is because in matters of taxation, due process is satisfied if the *party assessed* is given an opportunity to be heard before some assessment board at some stage of the proceedings. *Texas Pipeline Co. v. Anderson,* 106 S.W.2d 758, 762 (Tex. Civ. App.—Austin 1937, writ ref'd). Since a property owner, that is the "party assessed", has a plethora of remedies available to contest value, due process is satisfied.

Since a lienholder, unlike an owner, is not the "party assessed" and is not personally liable for property taxes on property belonging to its mortgagor, a lienholder need not be afforded the same rights as a property owner. However, because any lienholder can be designated as the property owner's "agent" or "fiduciary", a lienholder accedes to the rights of the owner, free of corresponding liability. Thus, the Tax Code provides due process protection to a lienholder, like BELLAIRE.

The rationale for mandating that notice be given to a "property owner" is sound: a lienholder does not have the same liability as the "owner", it is not the "party assessed". The Tax Code provides that "property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed." Tax Code § 32.07. Persons or entities having legal title to the property are considered "owners" for purposes of taxation. *See Childress County v. State,* 95 S.W.2d 1031 (Tex. 1936). Only "owners" are personally liable for the payment of ad valorem taxes. Tax Code § 32.07. Lienholders, who do not own the property until *after* foreclosure, and those persons with similar contingent interests in property, cannot be compelled by the taxing districts to individually pay ad

valorem taxes. *See, e.g., State v. Lincoln Corp.*, 596 S.W. 2d 593 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (pre-Code case holding that secured creditor who does not own property does not personally owe taxes on the property). Nor can a personal judgment be taken against the lienholder. *See* Tax Code § 32.07. *See also City of San Antonio v. Toeperwein,* 133 S.W. 416 (Tex. 1911). Since only property owners, not lienholders, are required to *pay* taxes, due process requires only "property owners" or their fiduciaries be given notice of assessment and an opportunity to contest same. The Tax Code clearly does this. *See* Tax Code §§ 1.07; 23.43(a); 25.19; 41.11; 41.411; 41.46. *See also Bennett-Barnes Investments, supra.*

If taxes remain delinquent, and collection methods pursued, lienholders are regularly and uniformly made parties to any such proceeding. *See Coakley v. Reising,* 436 S.W.2d 315 (Tex. 1968), *appeal after remand,* 457 S.W.2d 431 (writ ref'd n.r.e.). This is because a tax lien is superior to any other lien and after a tax sale, any interest held by the mortgagee might be eliminated. Tax Code § 32.05(b). Thus, a lienholder must be made a party to such a proceeding because, upon sale, a "substantial property right" of the lienholder is affected. *See also* Rule 39 of the Texas Rules of Civil Procedure. The mere assessment and imposition of taxes which occurs with regularity and predictability, has no adverse impact upon a lienholder individually, or upon his ability to exercise his rights by virtue of his lien.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) ("Mennonite"), does not address the right of a lienholder to receive notice of and an opportunity to contest the appraised value, the taxes assessed and/or

the existence of an agricultural use designation attaching to its mortgagor's property. Instead, *Mennonite* involves a *tax sale*: an actual and real deprivation of a mortgagee's valuable property rights. By providing notice to a lienholder prior to foreclosure (tax sale), the Tax Code complies with both the letter and spirit of *Mennonite,* and no due process deprivation occurs.

C. The Texas Court of Appeals Properly Construed *Mennonite.*

HUFFMAN adopts the opinion of the Fourteenth Court of Appeals and its application of *Mennonite* to this case. Further, HUFFMAN rejects BELLAIRE's claim that the tax sale condemned in *Mennonite* is identical to the administrative appraisal and assessment process in Texas. Nothing could be further from the truth.

Like Texas, Indiana provides for notice of appraisal and assessment be sent to the "taxpayer", not the "lienholder". Ind. Code § 6-1.1-4-22 (1989). The *Mennonite* case did not attack this Indiana statute dealing with notice of appraisal and assessment—it only addressed the statute involving notice of a tax sale, a sale of the property to pay unpaid taxes previously assessed. BELLAIRE's attempt to correlate the "tax sale notice" in *Mennonite* to the "assessment and valuation notice" in Texas "emasculates" this Court's ruling and distorts the Fourteenth Amendment.

HUFFMAN agrees that BELLAIRE has a legally protected property interest and is entitled to notice prior to a tax sale. Such notice was afforded to BELLAIRE. Such notice is all *Mennonite* requires.

As a lienholder, BELLAIRE is in privity of contract with the mortgagor, or property owner. The relationship is typically defined and circumscribed by the promises, warranties and covenants contained in the promissory note, deed of trust and similar loan documents. One typical provision in these documents requires the mortgagor to provide the bank or lienholder with proof that taxes are paid. Failure to do so can result in a "default" allowing the lienholder to foreclose on the property or exercise its other remedies.

If BELLAIRE wishes to participate in the appraisal and assessment stages, contest value or receive notice of appraisals and the like, BELLAIRE merely needs to insert a provision in its form documents and/or have its borrower execute a form letter, addressed to the CAD, requesting notice be sent to BELLAIRE. For the price of a stamp, BELLAIRE can obtain more information than it could possibly want and can participate in virtually every phase of the taxing process.

It should be noted that the majority of taxpayers pay their taxes prior to delinquency: only a minute fraction of taxpayers ever fall delinquent. Once the taxes are delinquent, if suit is instituted, the lienholder is then notified prior to any tax sale. To mandate that the CAD *locate* every lienholder and send notice of appraisal, assessment and exempt or non-exempt status to them *in adaition to* every property owner, even before values are contested or payment of taxes is at issue, exceeds the bounds of due process. Such a mandate would cause a tremendous increase in the cost of disseminating

tax information. This in turn, would pass an already spiraling tax burden onto the shoulders of the majority of the taxpayers, who timely pay their taxes. To adopt BELLAIRE's procedure would only serve to overburden the taxing authorities and do little to afford lienholders any further due process protections. Further, if such information is disseminated without the property owner's permission such disclosure could impinge upon the property owner's right to privacy.

Justice O'Conner recognized the fallacy of BELLAIRE's argument in *Mennonite* when she wrote:

> When a party is unreasonable in failing to protect its interest, despite its ability to do so, due process does not require that the State save the party from its own lack of care.

Mennonite, supra at 809 (dissenting opinion). Since BELLAIRE has the ability to monitor taxes and ensure payment, obtain information directly from its mortgagor or from the taxing authorities (via proper authorization), and participate in the contest of such valuations (via proper authorization), this Court should not declare the Tax Code unconstitutional to save BELLAIRE from the consequences of its own lack of diligence and care.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. DARLOW
PRAPPAS, DARLOW &
CHILDERS, P.C.
3120 Southwest Freeway #412
Houston, Texas 77098
713/526-3439

Counsel of Record for Respondent,
Huffman Independent
School District

APPENDIX A

HUFFMAN I.S.D. TAX OFFICE
24403 E. LAKE HOUSTON PARKWAY
HUFFMAN, TEXAS 77336
PHONE: (713) 324-1871

ADMINISTRADOR OF TAXES
[illegible] CTA. ZPA
[illegible] DELINQUENT TAXES

FIRST NAT'L BANK BELLAIRE
COLES WARREN G. JR.
P.O. BOX 40
BELLAIRE, TX. 77401

ACCOUNT NO	PROPERTY DESCRIPTION
62-002-0002	TR 2B PT TRS 1 & 1D AGU 4510 AG ASSESSED 10-1 ABST 62 JOHN R RHEA 379.74 AC

RECEIPT NO 600825

1985

THIS IS TO CERTIFY THAT A REDEMPTION RECEIPT HAS BEEN ISSUED FOR THE TOTAL DELINQUENT TAXES DUE ON THE PROPERTY HEREIN DESCRIBED FOR THE YEAR.

HUFFMAN ISD 01		15816.29
Vouc. # 86-322	90	
	CC	128.00
	RM	75.00
	TS	37.50

TAX	15816.29
P & I	7429.80
ATTY. FEE	3775.88
MISC. COST	240.50
TOTAL	27342.47

IF PAID IN	P & I DUE	IF PAID IN	P & I DUE	IF PAID IN	P & I DUE
SEP89	12558.13	MAR90	13649.46	SEP90	14740.79
OCT89	12740.03	APR90	13831.34		
NOV89	12921.91	MAY90	14013.24		
DEC89	13103.80	JUN90	14195.12		
JAN90	13285.68	JUL90	14377.01		
FEB90	13467.57	AUG90	14558.89		

ATTORNEY FEES CHARGED

☐ MONEY ORDER
☐ CHECK
☐ CASH

[illegible] $27342.47CK

DATE ______ RECEIVED BY ______

(3)

No. 89-1117

In The

Supreme Court of the United States

October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,

Petitioner,

vs.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS – COUNTY OF HARRIS,

Respondents.

REPLY BRIEF TO RESPONDENT HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record

March 26, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.1 LIST

A complete list of Petitioner First National Bank of Bellaire's parent companies, subsidiaries, and affiliates is included in the petition for writ of certiorari.

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TABLE OF AUTHORITIES

No. 89-1117

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REPLY BRIEF TO RESPONDENT HUFFMAN INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully submits this reply brief to Respondent Huffman Independent School District's ("Huffman") brief in opposition to petition for writ of certiorari.

STATUTORY PROVISIONS

Section 1.11(a) of the Texas Tax Code provides as follows: "On the written request of a property owner, an appraisal office or an assessor or collector shall deliver all

notices, tax bills, and other communications relating to the owner's property or taxes to the owner's fiduciary."

Section 23.52(a) of the Texas Tax Code provides as follows: "The appraised value of qualified open-space land is determined on the basis of the category of the land, using accepted income capitalization methods applied to average net to land. The appraised value so determined may not exceed the market value as determined by other methods."

ARGUMENT

Respondent Huffman raises three points that should be briefly addressed: (1) the case is moot since Bellaire paid the 1985 taxes claimed by Huffman; (2) the appraised value of the property was not increased in 1985; and (3) Bellaire should have requested notice of the tax administrative proceedings as a "fiduciary" of the owner of the property.

A. The case is not moot.

First, the case is not moot. The 1985 taxes claimed by the State of Texas – County of Harris, one of the Respondents, have *not* been paid. For that reason alone, the case is not moot.

After the petition for certiorari was filed in this case, an officer of Bellaire did pay the 1985 taxes claimed by Huffman when he received a demand for the taxes along

with additional penalties and interest.[1] Evidencing his intent to make only an escrow payment, however, the officer noted on the check that those taxes were paid "subject to appeal to the Supreme Court." Upon learning of the payment during a phone conversation with Huffman's attorney a few days after the payment, counsel for Bellaire immediately notified counsel for Huffman in writing and demanded that the payment be returned unless it was agreed that the taxes would be refunded should Bellaire ultimately prevail in this suit. The payment was not returned.

The Texas courts have not been generous in providing remedies to taxpayers. When taxes are paid while an appeal concerning the taxes is pending under circumstances similar to those here, however, the Texas Supreme Court has held that the appeal is not moot and the taxes paid may be recovered. *Highland Church of Christ v. Powell*, 640 S.W.2d 235 (Tex. 1982). No one is misled into thinking that the litigation is concluded and the decision may provide guidance in the future. *Id.* In any event, the state court after hearing the circumstances surrounding payment may decide the question of whether Bellaire is entitled to return of the Huffman taxes on remand should this Court hold that Bellaire was denied due process under the Texas tax system. Thus, the important question

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[1] It is not clear that all of the 1985 Huffman taxes have been paid. Appendix A to Huffman's brief in opposition shows that $13,285.68 in penalties and interest were claimed by Huffman if payment was made in January 1990, while that same tax record shows that only $9,489.80 in penalties and interest were paid.

presented in this case as it relates specifically to Huffman, like the identical question relating to Harris County, is also not moot.

B. The appraised value of the property was increased in 1985.

Second, Huffman misconstrues the Texas system when it asserts that the appraised value of the property was not increased in 1985 but instead the land simply did not receive an agricultural "credit" in that year. If an owner applies for land to be appraised as "agricultural," "timberland," or some other special designation, the Tax Code provides that a different method for appraising the property may be used. For instance, "open-space" or agricultural land is appraised "using accepted income capitalization methods" as opposed to the fair market value approach. Tex. Tax Code Ann. § 23.52(a) (Vernon 1982). The alternative method of appraising property might result in a lower value than if it is appraised under the fair market value method, in which case the taxpayer's tax liability is reduced. The taxpayer does not, however, get a "credit" if his property receives a special designation.

Regardless of which method was used to appraise the property in 1984 or 1985, however, in this case the appraised value for tax purposes dramatically increased in 1985. Contrary to Huffman's assertion, Bellaire does not claim that it had a right to require that a particular method be used in appraising the property. Under the Fourteenth Amendment, Bellaire had the right to challenge the amount of the appraisal whether fair market

value or some other approach was used. When the State appraises the property and assesses the taxes that are automatically secured by a superior lien, Bellaire's interest in the property is diminished, (in this case significantly so) and it is entitled to due process in terms of contesting the amount of the tax and the State's action in appraising the value of the property on which the amount of the tax depends. Because Bellaire was denied that right in any forum, it was not afforded due process.

C. Bellaire is not a fiduciary and, thus, cannot request notice under the Tax Code.

Huffman also asserts that Bellaire could have received notice of the 1985 appraised value of the property as a "fiduciary" of the owner *if* the owner had consented to delivery of such notice to Bellaire rather than to himself.[2] Tex. Tax Code Ann. § 1.11(a) (Vernon 1982). A "fiduciary," however, is a trustee, a partner, or an officer of a corporation, as in *MCI Telecommunications Corp. v. Tarrant County Appraisal District*, 723 S.W.2d 350 (Tex. App.–Fort Worth 1987, no writ), the case cited by Huffman. The term would not include a lienholder.

Moreover, even if a lienholder is a "fiduciary," Bellaire would have been required to get the landowner to give up his right to tax notices in order for Bellaire to

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[2] The Texas Tax Code provides that a property owner may request that all notices, tax bills, and other communications relating to the owner's property or taxes be delivered to the owner's fiduciary. Tex. Tax Code Ann. § 1.11(a) (Vernon 1982). Under that section, the designated fiduciary would receive the notices instead of the owner.

receive them. The landowner is unlikely to want to give up his right to notice and hearing, and there is no reason he should be forced to make that choice. The only reason to have him make the choice is to enable Huffman to preempt Bellaire's lien, but it is Huffman that should be faced with a choice. Huffman can either send the notice to the lienholder and allow an opportunity to be heard, and, thus, retain its right to a superior lien, or it can deny notice and an opportunity to be heard and maintain a subordinate lien. Under the Fourteenth Amendment, Bellaire's right to due process should not depend on its ability to convince the property owner to give up the owner's right to due process and to appoint Bellaire as the owner's fiduciary to act on his behalf. Furthermore, due process should not require Bellaire to take on the burden of serving as the owner's fiduciary in order to receive notice and an opportunity to be heard with the inherent conflicts that might arise.[3]

Again, however, Huffman's contention misses the point. As it stated in its brief to the Texas court of appeals: "Even if notice of tax assessments and values were given to all lienholders, only *property owners*, or their agents, can contest valuations and appeal from same. *See, e.g., Bennett-Barnes Investments Co. v. Brown County Appraisal District*, 696 S.W.2d 208 (Tex. App.–Eastland 1985, writ ref'd n.r.e.)." Brief of Huffman in court of appeals at 15-16 (emphasis original). The Texas courts

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[3] The price Huffman would exact from individuals for due process, if it could be obtained at all, is, thus, far greater than the price of a postage stamp as Huffman has suggested. Huffman's brief in opposition at 20.

have agreed, leaving the lienholder whose interests are significantly affected by the tax authorities powerless to contest their actions. Empty notice of tax appraisals and tax foreclosures without the right to be heard does not constitute due process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and that judgment be rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceedings.

Respectfully submitted,

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

and

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner
First National Bank of Bellaire

*Counsel of Record

NO. 89-1117

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

FIRST NATIONAL BANK OF BELLAIRE,
Petitioner,

v.

HUFFMAN INDEPENDENT SCHOOL DISTRICT AND
STATE OF TEXAS - COUNTY OF HARRIS,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

MOTION OF THE STATE OF TEXAS FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION and INTERVENOR'S BRIEF IN OPPOSITION

JIM MATTOX
The Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

WILLIAM DUKE KIMBROUGH*
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2002
ATTORNEYS FOR THE STATE OF TEXAS
*Attorney of Record

March 30, 1990

LIST OF PARTIES

PETITIONER:	FIRST NATIONAL BANK OF BELLAIRE
RESPONDENTS:	HUFFMAN INDEPENDENT SCHOOL DISTRICT AND STATE OF TEXAS - COUNTY OF HARRIS
INTERVENOR:	STATE OF TEXAS

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MOTION OF THE STATE OF TEXAS FOR LEAVE TO INTERVENE TO FILE BRIEF IN OPPOSITION

To the Supreme Court of the United States:

On March 2, 1990, the Attorney General of the State of Texas received notice from Petitioner, when Petitioner delivered a copy of its petition for writ of certiorari to the Attorney General of Texas, that the constitutionality of a statute of the State of Texas, the Texas Tax Code, is drawn into question.

Jim Mattox, Attorney General of the State of Texas, respectfully moves that an order be entered permitting the State of Texas to intervene and become a party respondent

for the purposes of filing a brief in oposition to the petition for writ of certiorari. The State of Texas further moves for order granting leave to file the attached Intervenor's Brief in Opposition.

The State of Texas should be permitted to intervene because this is a proceeding wherein the constitutionality of Sections 32.01, 32.05(b), 25.19(a), 41.41, 42.01 and 42.09 of the TEXAS TAX CODE, statutes of the State of Texas which affect the public interest, are drawn into question. The State of Texas cannot find record that it was notified at the state court level of the proceeding as provided by TEX. CIV. PRAC. & REM. CODE ANN. Sec. 37.006 (Vernon 1986). The State of Texas has not been provided with an opportunity to intervene in this proceeding before this time.

Respectfully submitted,

JIM MATTOX
The Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

WILLIAM DUKE KIMBROUGH*
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2002

ATTORNEYS FOR THE STATE OF TEXAS
*Attorney of Record

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STATE OF TEXAS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Misstates The Facts

Petitioner on page 1 of its Brief states:

> . . . Respondent taxing units increased the appraised value of real property . . ..

On page 9 of Petitioner's Brief Petitioner states:

> . . . a portion of the property consisting of 379.74 acres was reappraised by the Respondent taxing authority . . ..

These statements are not true. Respondent taxing authority did not reappraise this, or any other land. The land was appraised by the Harris County Appraisal District, an entity separate from Respondent taxing units. Tex. Tax Code Ann. § 6.01. Petitioner actually applied to the Harris County Appraisal District and secured a reduction in the appraised value after January 1986. Petitioner's Brief, p. 9.

The Facts of the Case

Petitioner was already the owner of the property, not a lienholder, when it filed its cross-motion for summary judgment asserting that as a lienholder its lien should be superior to the tax lien because it had not been accorded due process.

Petitioner obtained a reduction in the appraised value following the 1986 tax assessments and a corresponding reduction in taxes. Petitioner's Brief p. 9. Petitioner undoubtedly accomplished this by following the procedures of protest and hearing before the Harris County Appraisal District. Tex. Prop. Tax Code § 41.41 *et seq.* Nevertheless, having been through the procedures for protest and adjustment of appraised value, Petitioner failed to make the Harris County Appraisal District a party to this suit.

The property had been appraised for an amount of money, and this amount was subsequently raised by reappraisal. There would have been some taxes assessed against the property before the appraised value was increased.

Petitioner's position is that none of the taxes, not just the tax increase occasioned by the increased appraisal, should have a lien superior to the mortgage lien claimed by Petitioner.

SUMMARY OF ARGUMENT

Respondent taxing units had nothing to do with the increase in the appraised value of Petitioner's property; the appraised value was increased by the Harris County Appraisal District, which is not a party to this suit.

The Harris County Appraisal District should have been made a party, since Petitioner's complaint of denial of due process is addressed to the procedures of the appraisal district. If the appraisal district had been made a party it could have explained its procedures to the trial court, and would have been subject to an order directing it to grant Petitioner a hearing on the question of appraised value.

It is not appropriate for the courts to grant any relief involving adjustment of the appraised value, because the appraisal district is not a party. It is not appropriate for the courts to abolish the priority of Respondents' tax liens, because the proper relief if any, would have been to order a reduction in the amount of the tax liens proportional to the excess appraisal value, if it is excessive.

BRIEF OF THE ARGUMENT

Petitioner is a sophisticated creditor that asserts it is the victim of a public school system's appraisal method, when it is a fact well known to Petitioner that under Texas law the school system does not make appraisals of property for tax purposes. Texas has a two tiered tax system whereunder the various taxing units, school districts, counties, college districts, cities, etc., levy taxes each year by adopting a tax rate at a public hearing. Sec. 26.05 Texas Tax Code. Each taxing unit assesses taxes by applying the adopted tax rate to the value shown on the appraisal roll for each property—this action creates a tax roll. Secs. 26.05, 26.06, Texas Tax Code.

No taxing unit, such as a school district, city, college district, county, etc., has any authority to appraise, or determine the value of any property. The value of all property is determined by a central appraisal authority called the appraisal district. Only the appraisal district can increase or lower an appraised value, and the Texas Tax Code provides procedures for the appraisal districts to follow in doing this. In this case the appraisals were made by the Harris County Appraisal District.

There is no procedure by which Respondents Huffman Independent School District and Harris County could have made any appraisal of Petitioner's property, or could have increased or decreased any appraisal of Petitioner's property. The Texas Courts could not order Respondents Huffman Independent School District and Harris County to lower the appraised value on Petitioner's land, because Respondents do not maintain the appraisal rolls and have no access to them. The appraisal records are maintained by the Harris County Appraisal District. Since Petitioner did not make the Harris County Appraisal District a party to this suit, the courts could not and cannot make a decision regarding the constitutionality of the appraisal district's procedure or to order any party to this suit to do anything about the appraised value of Petitioner's land.

If Petitioner had sued the appraisal district, the opinion of the Houston Court of Appeals in *First National Bank v. Huffman Independent School District,* 770 S.W.2d 571 (Tex. App.—Houston [14th Dist.] 1989, writ denied), that it was not deprived of due process by the appraisal district might have been germane to some issue in this case. Since the Harris County Appraisal District is not a party to this suit, whether the appraisal district's procedures satisfied Petitioner's right to due process is not an issue that can now be resolved.

Petitioner obscures the question and by referring to "taxing agencies," "taxing authorities" and "Respondent

taxing authorities" as if at all times Petitioner is referring to Respondents, the parties to this suit. As a matter of fact no party to this suit increased the appraised value of Petitioner's property. It is true that, as stated at the top of page 7 of Petitioner's brief, that the Respondent school district and Harris County might reassess the taxes each year; but it is not true that the school district and the county must give notice to the landowner when land is reappraised at a higher value. This is the duty of the appraisal district, which is not a party to this suit. The appraisal district, not the school district or the County, gives notice and holds a hearing.

The Harris County Appraisal District does not levy taxes, so it could only loosely be referred to as "the taxing authority." Huffman Independent School District and Harris County do levy taxes, so they might possibly be referred to as "taxing authorities", although the Tax Code calls them "taxing units." Tex. Tax Code § 26.01. Taxing units would have no business giving Petitioner notice of increased appraisal, and, under the Tax Code, Harris County Appraisal District would not give notice of any increase in taxes assessed by taxing units. Tax assessments are not made until the appraisal rolls are complete; tax assessments are made by the entities having power to tax, such as school districts and counties.

Although the Code prohibits an appeal to the courts unless the landowner has participated in the administration process, the Texas courts have intertained appeals based on denial of due process, even though such appeals are not authorized by the Code. In *American National Trust & Savings Association v. Dallas Central Appraisal District,* 765 S.W.2d 451 (Tex.App.—Dallas 1988, writ denied), the Court remanded the case to the Dallas County Appraisal Review Board to conduct a hearing on the bank's protest of the appraisal that was made without notice to the bank.

The Texas Tax Code has now been amended to provide that persons, such as Petitioner, who claim an interest in the property can participate in the administrative process and give notice of protest of the appraised value of property. Sec. 41.44(d) Texas Tax Code.

It is not strictly true, as stated by Petitioner on page 8 of its application that no common-law or other remedy not provided in the Code may be asserted. To the extent that this claim was true in any part, it is no longer true because of the amendments to Section 41.44(d), Texas Tax Code. Even prior to the amendments to the Tax Code, Petitioner could have sued the Harris County Appraisal District (not Respondent taxing units) claiming denial of due process and asking for reappraisal. *American National Trust & Savings Association v. Dallas Central Appraisal District, supra.*

It seems apparent that Petitioner made its own business decision to put its money into the speculation in Texas real estate. The bottom now has fallen out of the real estate market. It is the usual practice of a lending institution to secure an abstract of title and a title opinion before loaning such a large sum (in the neighborhood of one million dollars). Now Petitioner says that it should not have any responsibility for monitoring the tax status of its property, and that the appraisal district must conduct a title search and notify all lienholders before any change is made in the appraisal of the property securing its loan. This position is at odds with the presumption that a property owner knows the law relative to taxing procedures affecting his property. *City of San Antonio v. Terrill,* 202 S.W. 361 (Tex.App.—San Antonio 1918, writ ref'd).

In this case Petitioner is seeking escape from taxation altogether. What it has asked the Texas Court to do is to declare that its supposed mortgage lien is superior to the tax lien on the basis of a due process violation. If the

property could be sold for enough to pay both the taxes and Petitioner's supposed lien it would not matter which had priority. Apparently, the property will not bring enough on today's market to pay both the debt and the taxes. Petitioner is not asking for a fair appraisal; it does not claim that the reappraiseal was wrong; it does not suggest what the appraisal value should have been, or what might have been the result if it had received written notice of the reappraised value and could have contested it. Petitioner does not ask for any relief related to the appraised value, whether too high or too low. What it asks is that the school and the county be penalized for some supposed defect in the procedures followed by the appraisal district—and the appraisal district is not even a party to the suit!

Petitioner's proper remedy, as exemplified by *American National Trust and Savings Association v. Dallas Central Apraisal District, supra,* was to have sued the appraisal district and asked the Texas courts to order the appraisal district to grant a hearing on the question of the proper appraised value.

If Petitioner doesn't have to pay taxes in this case, all the sophisticated creditors in the United States could possibly claim a refund of any taxes that were paid on property where the sophisticated creditor claims it had no notice of the appraisal procedure and did not know that the value of its investment had increased. This would be a real windfall for creditors and tax attorneys alike.

THE QUESTION PRESENTED

The "Question Presented" by Petitioner has elements that are meaningless. For instance, the phrase "to increase the tax appraisal" has no definite meaning. To increase "the tax burden" is vague and indefinite because the amount of the tax may be increased by an increase in the rate of tax or by an increase in the valuation of the property. The amount of the tax may even be lowered if the

tax rate is reduced enough, even though the valuation may be increased. Conversely the amount of the tax might be increased if the rate goes up enough, even though the valuation is reduced. The value of the property interest of Petitioner was probably diminished by the falling real estate market, not by the fact that a tax lien has priority over other liens.

Petitioner does not state that Respondents are guilty of unlawfully raising their tax rates, but only that the appraised value was increased (by the Harris County Apraisal District, not by Respondents). In fact, Petitioner does not even claim that Respondents raised their tax rates. Petitioner has no claim against Respondents, and asks for no relief against Respondents. In the absence of any claim for relief against Respondents, Petitioner's suit may be regarded as one seeking an advisory opinion only.

If Petitioner had joined the Harris County Appraisal District as a party and had shown itself entitled to any relief, the relief granted should only have been to nullify the taxes based on the amount of the increase in appraised value, not to nullify the priority of the tax lien in its entirety.

The court below properly ruled that the requirement of *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983), for notice of a tax sale had been met. *Mennonite* does not require that the priority of all of a tax lien must be subordinated to a mortgage lien if some of the tax is imposed because of an increased appraisal of which the lien-holder had no notice.

CONCLUSION

For these reasons, and for the reasons stated in the opinion below, the application for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
The Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

WILLIAM DUKE KIMBROUGH*
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2002

ATTORNEYS FOR THE STATE
OF TEXAS
*Attorney of Record

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ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMB
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record

April 6, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.1 LIST

A complete list of Petitioner First National Bank of Bellaire's parent companies, subsidiaries, and affiliates is included in the petition for writ of certiorari.

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To the Supreme Court of the United States:

First National Bank of Bellaire ("Bellaire"), Petitioner, respectfully submits this reply brief in response to the State of Texas' motion for leave to intervene to file brief in opposition and brief in opposition.

STATUTORY PROVISIONS

Section 41.412(a) of the Texas Tax Code, effective August 31, 1987, provides: "A person who acquires

property after January 1 and before the deadline for filing notice of the protest may pursue a protest under this subchapter in the same manner as a property owner who owned the property on January 1."

Section 41.44(a) of the Texas Tax Code provides, in relevant part: "Except as provided by Subsections (b) and (c), to be entitled to a hearing and determination of a protest, the property owner initiating the protest must file a written notice of the protest with the appraisal review board having authority to hear the matter protested. . . ."

Section 41.44(d) of the Texas Tax Code provides:

> A notice of protest is sufficient if it identifies the protesting property owner, including a person claiming an ownership interest in the property even if that person is not listed on the appraisal records as an owner of the property, identifies the property that is the subject of the protest, and indicates apparent dissatisfaction with some determination of the appraisal office. The notice need not be on an official form, but the State Property Tax Board shall prescribe a form that provides for more detail about the nature of the protest. The form must permit a property owner to include each property in the appraisal district that is the subject of the protest. The State Property Tax Board, each appraisal office, and each appraisal review board shall make the forms readily available and deliver one to a property owner on request.

ARGUMENT

Significantly, the Attorney General[1] does not contest the fact that Bellaire was denied due process when it was deprived of notice and the opportunity to contest the 1985 tax appraisal on the property on which it held a first lien. Instead, he proposes that the Court simply overlook this constitutional violation, and he implies that Bellaire's petition may be disposed of by reference to party joinder rules. First, he incorrectly contends that the section 41.44(d) of Texas Tax Code has been amended to remedy the constitutional infirmity to which Bellaire fell prey. Second, he contends that Bellaire should not be permitted to defend its property interest against the enforcement of a constitutionally invalid lien by simply raising the invalidity of the lien as against whichever governmental unit is attempting to avail itself of the benefits of the lien.

Neither contention is meritorious, and the very fact that the Attorney General so interprets Texas law emphasizes the need for this Court's ruling on these substantial issues. As discussed more fully below, the first contention

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[1] Although Bellaire does not oppose the Attorney General's intervention in this case, certain misstatements in his motion for leave to intervene should be corrected. The Attorney General was served with three copies of the petition for writ of certiorari on January 5, 1990. On January 29, 1990, he was served with notice of docketing and counsel appearance forms. Moreover, Bellaire was under no obligation to notify the Attorney General at the state court level as the Attorney General implies on page 2 of his motion because the statute requiring service on the Attorney General only applies to declaratory judgment actions. Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (Vernon 1986).

is premised upon an incorrect reading of the plain language of the new Texas statute. Due process rights of notice and an opportunity to be heard are afforded only to the "owner," even after the amendment to section 41.44(d). The second contention emphasizes the Code's "catch-22" for lienholders and reflects the Attorney General's misunderstanding of the nature of the property interest protected by the Constitution. Bellaire's protected interest – the value of its first lien – was diminished as a result of the attachment of the statutorily superior tax lien in favor of Huffman and Harris County. When those taxing authorities sought to enforce the lien, Bellaire was entitled to defend by asserting the invalidity of the lien on due process grounds.

A. The amendment to the Texas Tax Code does not afford lienholders due process.

Initially, the Attorney General argues that, although Bellaire's rights may have been violated in this case, that is unlikely to occur in the future. He asserts that section 41.44(d) of the Tax Code has been amended to allow "persons, such as Petitioner," to participate in the administrative process and challenge the tax appraisals. That assertion, which is contrary to the language of the statute, is indeed puzzling.

Section 41.44(a) of the Code provides that a "property owner" must file a written protest before a specified time in order, for instance, to protest the tax appraisal on the property. Section 41.44(d) simply defines the required contents of the protest and the amendment provides that the name of the "protesting property owner" may include

"a person claiming an ownership interest in the property even if that person is not listed on the appraisal records as an owner of the property."[2]

Neither that section nor any other guarantees a lienholder notice or an opportunity to protest the amount of the taking in terms of the appraised value of the property. The Texas court of appeals has already held in this case that the term "property owner" does not include a lienholder. Fundamental due process rights are afforded only to "owners." Thus, while the Code now permits an owner to list on his notice of protest the names of others claiming an "ownership" interest in the property, it still does not afford anyone other than the owner notice and an opportunity to protest. Despite the amendment, the Tax Code authorizes the State to diminish a lienholder's property interest through imposition of a superior lien without affording the lienholder any right to challenge in any forum the amount of the taking.

B. Bellaire is entitled to relief since its property was taken through imposition of the superior tax lien without affording it due process.

The Attorney General argues that Bellaire can be afforded no relief since the Harris County Appraisal District is not a party to this case. He contends that Bellaire's remedies are limited to suing to compel the appraisal

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[2] This language is probably an attempt to conform with the recently enacted section 41.412(a). That section expressly allows a new owner of property to pursue a tax protest if the new owner acquires that interest after January 1 but before the deadline to file protests expires.

district to give Bellaire a hearing to contest the 1985 tax appraisal, and that Bellaire cannot assert in defense to the foreclosure suit that the lien was invalid and subordinate to Bellaire's lien.

The Attorney General's contention is wrong. He concedes, as he must, that the tax lien in issue here arose under Texas law for the benefit of Huffman and Harris County, and not for the benefit of the appraisal district. The appraisal district simply performed the valuation work and forwarded it to Huffman and Harris County so that the respective tax rates could be applied and the taxes (the amount secured by the lien) finally determined. The attachment of the lien in this case, however, constitutes a taking in violation of Bellaire's due process rights. For that reason, Bellaire is entitled to defend against the enforcement of the lien by asserting its invalidity as against whichever taxing authority seeks to enforce it.

The Attorney General overlooks the fact that Bellaire's posture in the case is defensive; it can therefore defend against the lien as an unconstitutional taking. Since the appraisal district is not involved in the enforcement process, the district's presence in this litigation is not required for Bellaire to obtain the relief to which it is entitled.

Indeed, under current Texas law it is proper for an owner who was not given notice of the reappraisal to defend against enforcement of an invalid tax lien without joining the appraisal district as a party. In *Garza v. Block Distributing Co.*, 696 S.W.2d 259, 262 (Tex. App.–San Antonio 1985, no writ) for example, the owner was not given "notice of the [appraisal] increase . . . [or] an opportunity

to be heard before his property . . . [was] encumbered by an additional tax lien." Although the appraisal district was not a party, the court affirmed a permanent injunction, inter alia, preventing the tax assessor from levying to collect the taxes assessed because of the due process violation.

Texas courts therefore recognize that when the process by which appraised value is determined is constitutionally infirm, an owner may resist efforts by the tax assessor to collect the tax thereby assessed without joining the appraisal district as a party. There is no requirement for such joinder under Texas procedural or substantive law. Moreover, there is absolutely no principled basis upon which to require, as the Attorney General proposes, that lienholders whose property interests are likewise diminished must jump through even more procedural hoops than a similarly situated owner.

This Court has likewise invalidated liens and voided assessments where a board of equalization that "represents the State" violates a landowner's right to due process by denying it an opportunity to contest the amount of the assessment. *E.g., Londoner v. City & County of Denver,* 210 U.S. 373 (1908). Where the State legislature "instead of fixing the tax itself commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayer shall have an opportunity to be heard." *Id.* at 385-86. Otherwise, that tax cannot be collected and the constitutional defect may be asserted against whoever attempts to do so. There is

no necessity for joinder of the appraisal district for Bellaire to obtain relief from the unconstitutional taking in terms of invalidation of the tax lien held by Respondents.

Moreover, the holding in *Bank of America National Trust & Savings Association v. Dallas Central Appraisal District*, 765 S.W.2d 451 (Tex. App.–Dallas 1988, writ denied), cited by the Attorney General, in no way precludes the relief sought by Bellaire here. In that case, a party became the owner of property by purchasing at a foreclosure sale before the tax appraisal notice was sent. The new owner did not receive the notice and first learned of the tax appraisal after it was too late under the Tax Code to contest it. The new owner's request that it nevertheless be given a hearing by the appraisal review board to challenge the appraisal was denied. The Texas court of appeals held that, under the Tax Code, as a property owner at the time the tax appraisal was mailed, the new owner was entitled to protest the appraised value of the property, and that the denial of that right deprived it of due process. The court therefore remanded the case with instructions that the appraisal review board conduct a hearing on the owner's protest. *Bank of America* is not on point. First, that was an action against the appraisal district for judicial review of the district's valuation of the property. It did not involve a situation where the taxing authorities were attempting to collect the taxes by foreclosure of an invalid lien, such as in Bellaire's case. The court simply granted precisely the relief sought in that case. Perhaps more importantly, however, the court did not suggest that remand to the appraisal review board was the exclusive remedy to vindicate the owner's constitutional rights or that the constitutional invalidity of the lien could not be raised as a defense in a suit to foreclose

the lien. Contrary to the Attorney General's suggestion, this important constitutional question cannot be resolved simply by reference to state rules of joinder.

The State's imposition of a superior lien, which diminished Bellaire's property interest, without giving Bellaire the opportunity to protest the extent of the lien (*i.e.*, the amount of the taking), was an unconstitutional taking. Until the State affords Bellaire due process, it should not be allowed to enforce a superior lien.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that its petition be granted and that the judgment and decision of the court of appeals be reversed and that judgment be rendered that Respondents take nothing, or alternatively that this case be remanded for trial or other proceeding.

Respectfully submitted,

ROBERT M. ROLLER*
GRAVES, DOUGHERTY, HEARON
& MOODY
2300 NCNB Tower
515 Congress Avenue
Post Office Box 98
Austin, Texas 78767
(512) 480-5600

DECATUR J. HOLCOMBE
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Attorneys for Petitioner

*Counsel of Record